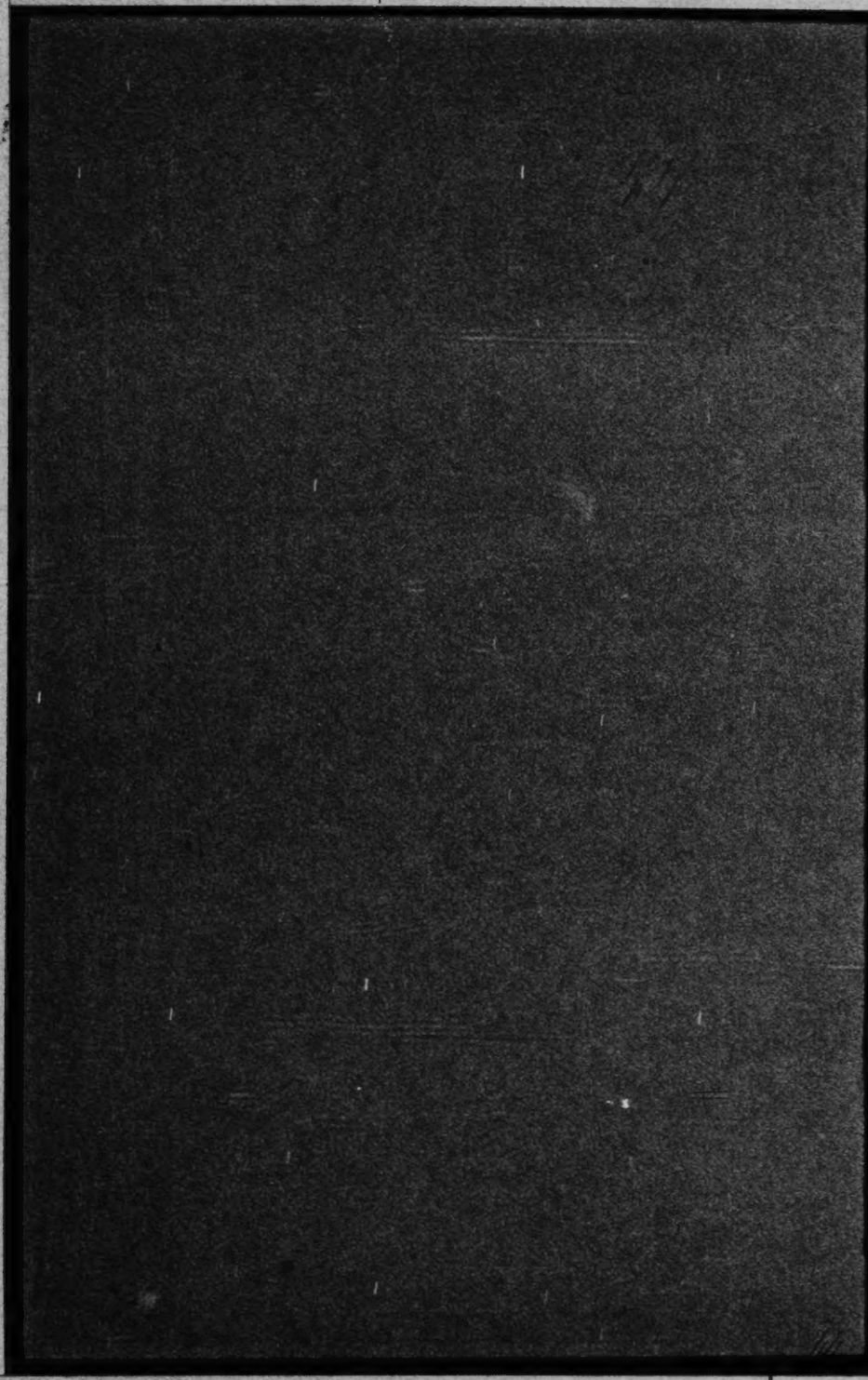

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27 Original

STATE OF OHIO ..... PLAINTIFF

V.

STATE OF KENTUCKY ..... DEFENDANT

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

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IN THE

Supreme Court of the United States

(OCTOBER TERM, 1961)

No. 27, Original

STATE OF FLORIDA, Plaintiff,

v.

STATE OF GEORGIA, Defendant.

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ARGUMENT

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR LEAVE TO FILE SHOULD BE DENIED. 2-4

CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 11, Original

STATE OF OHIO ..... *Plaintiff*

v.

STATE OF KENTUCKY ..... *Defendant*

QUESTION PRESENTED

WHETHER THE MOTION FOR LEAVE TO FILE AMENDED COMPLAINT SHOULD BE DENIED FOR FAILURE OF THE AMENDED COMPLAINT TO STATE FACTS UPON WHICH RELIEF CAN BE GRANTED.

STATEMENT

The State of Ohio instituted this proceeding in 1906 by filing its complaint in which it requested a declaration as to the location of the low water mark on the north shore of the Ohio River between Kentucky and Ohio, conceding that the low water mark on the north shore had been previously adjudicated as the boundary between the two states. Ohio has now moved the Court for leave to file an amended complaint, which is for all practical purposes an entirely new complaint, in which Ohio seeks to withdraw its previous concession that the low water mark of the Ohio River on the north shore is the boundary between the two states and seeks to establish the middle of the Ohio River as the boundary between the two states on the basis of matters allegedly occurring prior to the American Revolution.

ARGUMENT

A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR LEAVE TO FILE SHOULD BE DENIED.

It is true as plaintiff suggests that some of the rules relating to practice are not as strictly applied in original actions between states in this Court as in ordinary litigation in the district courts. *See Utah v. United States*, 394 U.S. 89, 95 (1969). Nevertheless, it should be pointed out that this original action has been pending for a period which is now in its sixth year and that the amended complaint seeks relief which is not only significantly greater in amount than that sought in the original complaint, but is based on entirely new and different grounds. The first complaint in this boundary dispute sought merely to establish the location of the low water mark on the north shore of the Ohio River, which was conceded to be the boundary between the states of Kentucky and Ohio. The amended complaint seeks to establish the middle of the river as the boundary on the basis of events which allegedly occurred prior to the American Revolution.

Plaintiff candidly recognizes the concession made in the original complaint, that the north shore low water mark as the boundary between the states was settled by a series of cases in this Court (Brief in Support of Amended Complaint, page 14), but has now so substantially changed its position as to argue that the evidence that the boundary lies in the middle of the river is "overwhelming." (Id. p. 17) Kentucky submits that this contention is legally baseless.

Anthony, 18 U.S. 374 (1820). The rationale of that case was followed in *Indiana v. Kentucky*, 136 U.S. 479 (1890). In both of those cases this Court pointed out very clearly that the territory now comprising Ohio was originally a part of territory of the Commonwealth of Virginia which was ceded to the United States at the behest of Congress and subsequently divided into Ohio and other states. The basis for the low water mark on the north side as the boundary was the language of Virginia's cession of "the territory northwest of the river Ohio." In *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 613 (1899), this Court stated:

> "It must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river."

Both Kentucky and Ohio courts have recognized the reasoning of those cases. See for instance *Commonwealth v. Henderson County*, Ky., 371 S.W.2d 27 (1963); *Booth v. Shepherd*, 8 Ohio St. (Critchfield) 243 (1858).

Ohio now argues that certain alleged treatments of subject territory by the British Crown and others prior to the American Revolution indicate that the territory was not a part of Virginia and that the reasoning of the Supreme Court cases referred to above is therefore unsound. However, assuming for the sake of argument that it could be contended that the subject territory was not a part of Virginia prior to the American Revolution, that would not detract from the reasoning of the decisions referred to above. After the American Revolution, all of the territory involved in this controversy was a part of the whole territory of the sovereign United States of America. It was pursuant to congressional action of the sovereign United States of America and the action of the Commonwealth of Virginia included within it that the subject territory was ceded to the United States Government and subsequently became in part the State of Ohio. The State of Ohio was created by law of the sovereign United States of America. That law clearly recognized the north-

CONCLUSION

In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 445 (1945), this Court stated:

> "Leave to file should of course be denied if it is plain that no relief may be granted in the exercise of the original jurisdiction of this Court."

The motion for leave to file the amended complaint should be denied.

Respectfully submitted,

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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, George W. Mills, one of counsel for defendant herein and a member of the bar of the Supreme Court of the United States, hereby certify that service of the foregoing Brief in Opposition was made by depositing three copies each thereof in the United States mail, first class U.S. postage prepaid, addressed to William J. Brown, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215; Donald R. Leach, Executive Assistant to the Attorney General, State House Annex, Columbus, Ohio 43215; Joseph M. Hoffheld, Assistant Attorney General, State House Annex, Columbus, Ohio 43215, Counsel for Plaintiff, State of Ohio.

This 22nd day of October, 1971.

Assistant Attorney General

Supreme Court, U. S.
FILED
APR 18 1972
...AK, JR., CLE...

IN THE

Supreme Court of the United States

October Term, 1965
No. 27, Original

THE STATE OF OHIO,

Plaintiff

v.

THE COMMONWEALTH OF KENTUCKY,

Defendant

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE AMENDED COMPLAINT

PHILLIP FORMAN
Special Master

April 10, 1972

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1965
No. 27, Original

THE STATE OF OHIO,
Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant.

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE AMENDED COMPLAINT

E R R A T A

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1. Page 7, line 17: "acient" should be "ancient";

2. Page 9, line 18: "Lessee" should be italicized;

3. Page 9: below the last paragraph insert three asterisks;

4. Page 12, line 4: "boarder" should be "border";

5. Page 12, line 17: "Kentucky v. Indiana" should read "Indiana v. Kentucky";

6. Page 15, line 11: "dispusted" should be "disputed."

IN THE

Supreme Court of the United States

October Term, 1966 — No. 27, Original

THE STATE OF OHIO,
Plaintiff

v.

THE COMMONWEALTH OF KENTUCKY,
Defendant

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE AMENDED COMPLAINT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

On March 31, 1966, the plaintiff, State of Ohio, instituted an original action to locate the boundary between the States of Ohio and Kentucky on the Ohio River (River). The complaint recognized the northern boundary of the State of Kentucky as being "the low water mark on the northerly side of the Ohio River as it existed in the year 1792,"[1] but alleged that a series of dams constructed in 1910 and thereafter had caused the waters of the river to rise and inundate areas of Ohio, permanently raising the low water mark in areas along the northern shore of the River. It was further alleged that the State of Kentucky claimed ownership of the River to the new low water mark resulting from the higher level of its waters and exclusive jurisdiction over the entire River. The complaint prayed

1. Complaint, para. 8.

of the River has in Pre-Revolutionary historical documents which were said to be not prohibitively difficult to obtain for judicial scrutiny. At the same time, counsel for the State of Kentucky intimated that if permitted, the proposed amendment would necessitate the filing of a counterclaim for heavy expenditures made since 1792 north of the mid-point of the River. The propriety of permitting the proposed amendment to the complaint is the sole subject of this Report.

Shortly after this country won its independence, it became apparent that several states, including Virginia, claimed title to lands north and west of the Ohio River, from which the State of Ohio was later created. Fearing that a legislative attempt to resolve the conflict would severely threaten the newly formed bonds of union, Congress suggested that the states involved cede the disputed lands to the United States to become additional states. All of those states eventually complied with this request. Virginia did so in 1784, surrendering to the United States "all right, title and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio . . ." on the condition only that the land be formed into states.[3] The State of Ohio was established from this ceded territory pursuant to Article 5 of the Ordinance of 1787, which provided for the government of the northwest territories.[4] When admitted to the Union in 1802,[5] her southern boundary was described simply as bounded "on the south by the Ohio river, to the mouth of the Great Miami River.

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3. 1 Laws of the United States 472, 474 (B. & D. ed. 1784).

4. 1 Laws of the United States, 478, 480 (B. & D. ed. 1787).

5. Although Ohio was officially admitted to the Union on November 29, 1802, the state government did not begin to operate until March 1, 1803, and in 1953 Congress fixed the later date as the official day of admission. Ammann, Francis R., and Harvey Walker, The Government and Administration of Ohio, (1956), p. 27.

States. The court was thus called upon to settle the conflict of boundary between Kentucky and Indiana on the Ohio River. It held that resolution of the issue turned on the extent of land retained by Virginia after her cession of the territory north and west of the Ohio, from which Indiana as well as Ohio was formed, to which Kentucky succeeded as proprietor, reasoning as follows:

> . . . it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the north-west of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.
>
> *"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only."* (Emphasis added).[11]

Reasoning that Virginia was the original proprietor of both sides of the River, the Court held that after its cession of the northwest territory, Virginia retained title to the River up to the low water mark on the north shore, and that Kentucky, therefore, succeeded to the same rights when she became a state in 1792. Thus the land in question was held to lie within the State of Indiana.

This holding is now challenged by the State of Ohio on the grounds that (1) the reasoning of the Court was in

11. *Id.* at 378.